

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CYNTHIA MUNDY

Claimant

VS.

LAMAR DISTRIBUTION SERVICES, INC.

JOHN SEXTON AND COMPANY

Respondents

AND

HANOVER INSURANCE COMPANY

CNA INSURANCE COMPANY

Insurance Carriers

AND

THE KANSAS WORKERS COMPENSATION FUND

Docket No. 160,435

ORDER

Respondent, John Sexton and Company, appeals from an Award entered by Administrative Law Judge Shannon S. Krysl on September 23, 1994.

APPEARANCES

Claimant appeared by and through her attorney, James B. Zongker of Wichita, Kansas. Respondents and insurance carriers appeared by their attorneys, Kim Martens of Wichita, Kansas and John Jurcyk of Lenexa, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John L. Carmichael of Wichita, Kansas.

RECORD & STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Although listed under a single docket number, this case involves two separate claims. In the first, claimant alleges that she injured her low back on April 27, 1991, while pushing boxes on a line in the course of her employment at Lamar Distribution Services, Inc. The second claim, against John Sexton and Company, alleges that after the injury at Lamar Distribution Services, Inc., claimant went to work for John Sexton and Company and there aggravated the previous low back injury. The Administrative Law Judge first entered a final award on this case on April 29, 1994. In that first award she found a disability which

she apportioned between the two respondents. On appeal, the Appeals Board remanded the claim to the Administrative Law Judge with instructions to enter separate awards as to the separate dates of accident and separate employers. On September 23, 1994, the Administrative Law Judge did enter separate awards, finding that claimant suffered five percent (5%) permanent partial disability at Lamar Distribution Services, Inc. and a forty percent (40%) permanent partial disability as a result of the aggravating injury at John Sexton and Company. The Administrative Law Judge also ordered John Sexton and Company to reimburse Lamar Distribution Services, Inc. for \$3,054 in medical expenses which were paid by Lamar Distribution Services, Inc. after the aggravating injury at John Sexton and Company.

In this appeal, John Sexton and Company listed as issues in its Application for Review:

- (1) Whether claimant met with personal injury by accident with John Sexton and Company on the dates indicated;
- (2) Whether respondent had received notice and whether prejudice resulted from lack of notice;
- (3) The nature and extent of claimant's disability;
- (4) Whether the Administrative Law Judge erred in ordering John Sexton and Company to reimburse Lamar Distribution Services, Inc.;
- (5) Whether the Administrative Law Judge erred in failing to apply the rationale of Miner v. M. Bruenger & Co., 17 Kan. App. 2d 185, 836 P.2d 19 (1992).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds, with the exception of one ruling discussed below, the decision by the Administrative Law Judge should be affirmed and hereby adopts as its own the findings of fact and conclusions of law stated in the Award. The sole exception is the Order by the Administrative Law Judge that John Sexton and Company reimburse Lamar Distribution Services, Inc. for medical expenses previously paid. The Administrative Law Judge cites K.S.A. 44-556 as support for the order. From review of the statutory language it appears that K.S.A. 44-556 applies to benefits paid while claim is pending on appellate review. Medical expenses paid by Lamar Distribution Services, Inc. were paid prior to entry of the Award and not while on appeal. Accordingly, the Appeals Board finds applicable the provisions of K.S.A. 44-534a which requires payment or reimbursement by the Kansas Workers Compensation Fund when medical or temporary total benefits were paid either voluntarily or pursuant to order and it was subsequently determined that the employer or its insurance carrier does not owe those benefits. Accordingly, the Appeals Board finds that the Kansas Workers Compensation Fund, not John Sexton and Company, should reimburse respondent, Lamar Distribution Services, Inc., in the amount of \$3,054 for medical expenses previously paid.

The Appeals Board notes the questions relating to whether claimant suffered injury working for John Sexton and Company and whether claimant gave notice of the injury were decided in the first Award of April 29, 1994. The Administrative Law Judge found claimant did not give notice but that there was no prejudice to respondent. This finding was not appealed in the first appeal and the Administrative Law Judge made no new finding on the notice issue in the second Award. The current appeal is, as to the notice issue, out of time. The finding that claimant suffered injury at John Sexton and Company was challenged in the first appeal. Because the case was remanded, the Appeals Board made no finding on this question in its first decision. The Appeals Board does here expressly affirm the finding by the Administrative Law Judge that claimant was injured in the course of her employment for John Sexton and Company.

Finally, the Appeals Board does not consider it necessary to apply here the rationale from Miner v. M. Buenger & Co., 17 Kan App. 2d 185, 836 P.2d 19 (1992). There is no indication here that work restrictions were ever recommended before claimant's work at John Sexton and Company. In addition, the testimony by Mr. Hardin indicates he had excluded a portion of the labor market, specifically heavy and very heavy jobs, before he considered the effect of the work restrictions on claimant's loss of ability to earn a comparable wage and loss of ability to perform work in the open labor market. Therefore, the pre-existing limitations were to some extent factored into the work disability determination. As indicated the Appeals Board otherwise adopts all findings of fact and conclusions of law stated in the Award by the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated September 23, 1994, shall be, and is hereby, modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cynthia Mundy, and against the respondent, Lamar Distributions Service Inc., and the insurance carrier, Hanover Insurance Company, for an accidental injury sustained on May 1, 1991.

Claimant is entitled to 415 weeks at \$13.47 or \$5,590.05 for a 5% permanent partial general body disability, making a total award of \$5,590.05.

As of March 31, 1995 there would be due and owing to the claimant 204.43 weeks of permanent partial disability compensation at \$13.47 per week in the sum of \$2,753.67, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$2,836.38 shall be paid at \$13.47 per week for 210.57 weeks or until further order of the Director.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cynthia Mundy and against the respondent, John Sexton and Company, and the insurance carrier, CNA Insurance Company, for an accidental injury sustained on August 1, 1991.

Claimant is entitled to 103 weeks temporary total disability compensation at the rate of \$289.00 per week or \$29,767.00 followed by 299 weeks of permanent partial disability compensation at the reduced rate of \$126.54 per week or \$37,835.45 and 13 weeks of permanent partial disability compensation at \$140.01 per week or \$1,820.13 for a 40% permanent partial general body disability, making a total award of \$69,422.59 and with a contribution factor of 100% for a prior injury on May 1, 1991.

As of March 31, 1995, there would be due and owing to the claimant 103 weeks temporary total disability compensation at \$289.00 per week in the sum of \$29,767.00 plus 88.14 weeks permanent partial disability compensation at the reduced rate of \$126.54 per week in the sum of \$11,153.24 for a total due and owing of \$40,920.24 which is ordered paid in one lump sum less amounts previously paid. Followed by 210.86 weeks of permanent partial disability compensation at the reduced rate of \$126.54 per week or \$26,682.22 for a period from March 31, 1995, to April 14, 1999, when the first accident ends. Thereafter the remaining balance in the amount of \$1,820.13 shall be paid at \$140.01 per week for 13 weeks or until further order of the Director.

In addition, the Kansas Workers Compensation Fund is ordered to reimburse Lamar Distribution Services, Inc. \$3,054, pursuant to K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James Zongker, Wichita, KS
Kim Martens, Wichita, KS
John Jurcyk, Lenexa, KS
John L. Carmichael, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director